

AUG 21 1979

MICHAEL ROBINS, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 79-289

PRUNEYARD SHOPPING CENTER, ET AL., *Appellants*,

v.

MICHAEL ROBINS, ET AL., *Appellees*.

On Appeal From the Supreme Court
of the State of California

**BRIEF OF THE INTERNATIONAL COUNCIL OF
SHOPPING CENTERS AS AMICUS CURIAE IN
SUPPORT OF THE JURISDICTIONAL STATEMENT**

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INDEX

	Page
TABLE OF CASES	i
CONSTITUTIONAL PROVISIONS INVOLVED	1
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	3
CONCLUSION	13

TABLE OF CASES

<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968) ...	5, 6
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958)	10
<i>Diamond v. Bland</i> , 11 Cal.3d 331 (1974) <i>rev'g Diamond v. Bland</i> , 3 Cal.3d 653 (1970)	8
<i>Eastex, Inc. v. NLRB</i> , 98 S.Ct. 2505 (1978)	9
<i>Florida v. Mellon</i> , 273 U.S. 12 (1926)	11
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976)	9
<i>Lenrich Associates v. Heyda</i> , 504 P.2d 112 (Oregon 1972)	11, 12
<i>Lloyd Corporation, Ltd. v. Tanner</i> , 407 U.S. 551 (1972) <i>4-9, et seq.</i>	
<i>Marsh v. Alabama</i> , 326 U.S. 501 (1946)	5, 6

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CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment. United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Article I, Section 2. Constitution of the State of California

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

INTEREST OF THE AMICUS CURIAE

The International Council of Shopping Centers ("ICSC") is the trade association of the shopping cen-

ter industry. Members of ICSC, consisting of shopping center developers, owners, operators, tenants, lenders and related enterprises engage in the day-to-day activity of designing, planning, financing, developing, owning and managing shopping centers and their retail stores. The ICSC's 7,400 members represent a majority of the shopping centers in the United States.

These members have a clear interest in the disposition of the present case, since the holding in the court below directly challenges the controlling decision of this Court in *Lloyd v. Tanner*, 407 U.S. 551 (1972), on which ICSC members have relied in establishing fair and proper business policies for shopping centers.

Because the decision of the court below in the present case affects the daily management and legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry.

To bring to the Court's attention the views and arguments of the shopping center industry, the ICSC respectfully submits this brief in support of the Jurisdictional Statement in the present case.

THE QUESTIONS ARE SUBSTANTIAL

Shopping centers throughout the United States have relied upon this Court's decision in *Lloyd v. Tanner* in establishing orderly rules for access to their property by persons wishing to exercise their First Amendment rights in a non-business-related context.

The decision below conflicts directly with *Lloyd*. In reasoning and result, the lower court's decision violates established principles of the supremacy of federal constitutional law. Moreover, a conflict now exists between the decision below and a decision of the Oregon Supreme Court which has followed the holding of *Lloyd*. This conflict creates confusion for shopping center owners with respect to their business practices and their federally-based legal rights.

Because of its direct challenge to this Court's constitutional interpretation of the rights of shopping center owners, and, because of its implications for the business practices of all shopping centers, this case warrants full review by this Court.

1. The Decision Below Is in Direct Conflict With This Court's Decision in *Lloyd v. Tanner*

In *Lloyd v. Tanner*, 407 U.S. 551 (1972), this Court considered a case which closely parallels the present case and established principles which are in direct conflict with the decision of the court below. In that case, the appellees had attempted to distribute handbills in the enclosed mall area of a shopping center in Portland, Oregon. The shopping center had a strict rule against handbilling, based on the ground that handbilling was likely to annoy customers. The persons distributing the handbills left the center at the request of the security guards and later filed suit seeking declaratory and injunctive relief.

In *Lloyd*, this Court addressed the same issue which the present case raises: the conflict between the exercise of First Amendment rights and the recognition of

Fifth and Fourteenth Amendment property rights of shopping center owners. At the outset, the Court said:

We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments.

407 U.S. at 554.

In its analysis in *Lloyd*, this Court first distinguished its opinions in two previous cases: *Marsh v. Alabama*, 326 U.S. 501 (1942), and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) which, as discussed below, are similarly distinguishable from the present case.

In *Marsh*, this Court held that when private interests establish the functional equivalent of a municipality on private property and assume all municipal functions, then the property rights of those private owners must give way to the First Amendment rights of persons who use the "company town."

Lloyd distinguished *Marsh* on the grounds that the *Lloyd* Shopping Center had not become the functional equivalent of a municipality. The same distinction is true for the *Pruneyard* Shopping Center in the present case.

In *Logan Valley*, members of a union of employees of food stores attempted to picket a supermarket, located in a shopping center, which hired non-union employees and paid less than union wages. On review, this Court held that the union picketers were entitled to exercise their First Amendment rights on the shopping center property since the picketing was directly related to the shopping center's operations.

Lloyd distinguished this case on the ground that the handbilling activities at the Lloyd Center were not related to the operation of the shopping center. The same distinction applies to the present case; the petitioning activities of the appellees were also unrelated to the operation of the Pruneyard Shopping Center.

After distinguishing *Marsh* and *Logan Valley*, the Court in *Lloyd* squarely addressed the question of the property rights of the shopping center owners and stated the central issue of the case:

The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling.

407 U.S. at 567.

The Court then balanced the property rights of the shopping center owners with the rights of speech of the persons distributing handbills, specifically holding:

“... the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. . . . We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.”

407 U.S. at 570.

This holding is equally applicable to the present case; the Pruneyard Shopping Center was no more dedicated to public use than the Lloyd Center. It was a

privately-owned business property which did not perform municipal functions and which enforced its restrictions on petitioning in an entirely non-discriminatory fashion. In the present case, as in *Lloyd*, other, nearby places were available for the exercise of First Amendment rights; Pruneyard Shopping Center, like the Lloyd Center, was bounded in part by public streets available to all citizens.

The error of the court below in interpreting this Court's decision in *Lloyd* is manifest in its clearly inaccurate descriptions of the *Lloyd* opinion. For example, despite *Lloyd*'s thorough analysis of the characteristics of First Amendment rights of free speech and Fifth and Fourteenth Amendment property rights described above, the majority opinion below commented:

The Court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

23 Cal. 3d at 904.

While the Court in *Lloyd* may not have defined the nature or scope of the rights of shopping center owners “generally,” its decision was unmistakably based on an examination of the First, Fifth and Fourteenth Amendments. As Justice Richardson correctly observed in his dissent in the court below:

The majority seriously errs in its excessively narrow reading of *Lloyd*, which expressed its fundamental reliance upon the *constitutional private property rights of the owner* throughout the entire opinion.

23 Cal. 3d at 913.

The error of the court below in interpreting *Lloyd* caused it to overrule its proper decision in *Diamond v. Bland*, 11 Cal. 331 (1974) *rev'g Diamond v. Bland*, 3 Cal. 3d 653 (1970). In that case, the California Supreme Court correctly recognized the rationale of *Lloyd* and overruled its own first decision in the case shortly after *Lloyd* was decided. In its consideration of *Lloyd*, the California Supreme Court in *Diamond* noted that this Court recognized the federally-based property rights of shopping center owners:

Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement.

11 Cal. 3d at 335, n.4.

Having acknowledged that *Lloyd* recognized these property rights, the California Supreme Court rightly followed *Lloyd* by concluding that, under the facts presented, the property rights of shopping center owners outweighed the plaintiff's First Amendment rights:

In balancing the interests of the respondents in exercising their First Amendment rights against the property rights of the owners of the shopping center, the court in *Lloyd* concluded that the latter must prevail. The court stated that, in view of the availability to respondents of other public forums for the distribution and dissemination of their ideas, "it would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interests in exer-

cising First Amendment rights in the manner sought herein.

11 Cal. 3d at 334-35.

In its opinion in the present case, the court below erroneously attempted to rationalize its overruling of *Diamond* by suggesting that, in subsequent cases, this Court had reinterpreted the holding of *Lloyd*. To that effect it mistakenly relied on *Hudgens v. NLRB*, 424 U.S. 507 (1976) and *Eastex, Inc. v. NLRB*, 98 S. Ct. 2505 (1978). The decisions in these cases, however, were controlled by highly specialized provisions of the National Labor Relations Act and do not alter the application of *Lloyd* to the present case. Despite the convoluted attempt of the court below to justify its decision, it cannot avoid the inescapable conclusion that this Court's opinion in *Lloyd* should control the disposition of the present case.

2. The Decision Below Violates Basic Principles of the Supremacy of Federal Law

The lower court's decision in this case is based in large part on its finding that the Constitution of the State of California confers on the Appellees rights which go beyond those conferred by the First Amendment of the U.S. Constitution. In reaching this conclusion, the lower court not only overruled its own holding in *Diamond*, but also ignored basic supremacy principles which must be considered when federally and state-conferred rights conflict.

The tenets of supremacy are well established; Article VI, Section 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This Court has clearly and repeatedly interpreted this language to mean that when state statutes conflict with this Court's interpretation of the U.S. Constitution, the latter must prevail.

In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court succinctly described the history and theory of supremacy:

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme Law of the Land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 "to support this Constitution."

358 U.S. at 18.

When this Court has struck a clear balance between federal constitutional values, a state Court cannot simply bypass that balance and strike one of its own based on state statutes and policy. As this Court observed in *Florida v. Mellon*, 273 U.S. 12 (1926):

Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

273 U.S. at 17.

In the present case, the court below ignored these supremacy principles and used an interpretation of the California State Constitution to deny the federally-protected property rights of the owner of the Pruneyard Shopping Center which were clearly enunciated by this Court in *Lloyd*.

Federal property rights cannot depend upon the vagaries of state interpretations of state constitutional law. In denying these property rights, the court below erroneously disregarded the supreme nature of this Court's exposition of the U.S. Constitution.

3. The Decision Below Conflicts With Decisions of Another State Court and Confuses Shopping Center Owners

In *Lenrich Associates v. Heyda*, 504 P.2d 112 (Oregon 1972), the Oregon Supreme Court, applying *Lloyd* to facts very similar to those in the present case, reached a decision which stands squarely opposed to the lower court's decision in the present case. In *Lenrich*, members of a group known as the International Society of Krishna Consciousness attempted to chant, march and sell magazines about their religion in the enclosed mall area of a shopping center in Portland, Oregon. The Oregon court found little difference be-

tween that case and *Lloyd* and held that the shopping center could prohibit the activity.

In its analysis, the Oregon court found that *Lloyd* balanced First Amendment speech rights and Fifth and Fourteenth Amendment property rights:

Throughout Mr. Justice Powell's opinion are recurring statements making it clear that the court was engaged in weighing the First Amendment rights of the respondents against the Fifth and Fourteenth Amendment rights of private property owners.

504 P.2d at 115.

The Oregon court also found that the balancing by this Court of the federal constitutional rights precluded the application of the Oregon Constitution to extend speech protections beyond that provided by federal law.

Thus, *Lenrich* sits in direct conflict with the decision of the court below.

Until the decision of the court below in the present case, shopping center owners relied on the decision in *Lloyd* to establish business policies for the non-business-directed exercise of First Amendment rights.

The conflict between California and Oregon law, and the substantial prospect of conflict in other jurisdictions, has confused shopping center owners, who are now uncertain whether states will impose separate standards in balancing between private property rights and rights of free speech.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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